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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5243

JAMES T. ANDERSON,
PETITIONER,

v.

EDWARD FRODERMAN et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

PETITION NOT PRINTED

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Opinions Below

The memorandum and judgment of the United States Court of Appeals for the First Circuit, dated May 8, 1973, is not reported and is set forth in Appendix A. The order of the District Court is not reported and is set forth in an Appendix to the Petition.

Questions Presented

Did the Commonwealth of Massachusetts violate the petitioner's federal or constitutional rights when the Chief Justice of the Massachusetts Superior Court rescheduled an assigned trial date of a civil action the petitioner had pending in State Court?

Statutory Provisions Involved

ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

UNITED STATES CODE:

Title 42, § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, § 1985

> . . . (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat,

any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Con-

gress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 28, U.S.C. § 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT:

Rule 12:

"At any time, on such notice as the court may order, on motion of appellee, or sua sponte, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious manifest error the court may, similarly reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

"If the court concludes, after adequate opportunity for briefing, that even though there may be a substantial question, oral argument would not assist it, the Clerk will so advise counsel. No such conclusion will be reached unless the three judges, who will have examined the briefs, are unanimous in so concluding."

Statement

Petitioner brings this action against the Commonwealth of Massachusetts seeking civil rights damages under Titles 42, U.S.C. §§ 1983, 1985(2), (3) and 28, U.S.C. § 1343.

The petitioner alleges that his constitutional and federal rights were allegedly violated by the Commonwealth of

Massachusetts when a trial date originally assigned after a hearing by one justice of the Massachusetts Superior Court was reassigned by the Chief Justice of the State Court to another trial date (Petition, pp. 6, 9). Thereafter, the petitioner refused to have his deposition taken prior to the newly assigned State trial date and his action was dismissed and his appeal denied. *Anderson* v. *Froderman*, Mass. Adv. Sh. (1972) 1016, 282 NE 2d 893 (1972).

Argument

THE COMPLAINT FAILS TO STATE A CLAIM UNDER 42 U.S.C. § 1983 AND THE ACTION IS BARRED BY THE ELEVENTH AMENDMENT.

The Commonwealth of Massachusetts is not considered a "person" within the meaning of Title 42, U.S.C. §§ 1983 and 1985. See *City of Kenosha* v. *Bruno*, 41 U.S.L.W. 4819 (U. S. June 11, 1973).

This action is directed solely against the Commonwealth of Massachusetts and is barred by the Eleventh Amendment of the United States. *Employees of the Department of Public Health & Welfare, State of Missouri* v. *Department of Public Health & Welfare, State of Missouri*, 41 U.S.L.W. 4493, 4494 (U. S. April 18, 1973); *Parden* v. *Terminal Ry.*, 377 U. S. 184, 186 (1964); In re *Ayers*, 123 U. S. 443, 506 (1887) [for judicial immunity under § 1983, see *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967)].[1]

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[1] In a prior hearing on September 29, 1971, entitled *Anderson* v. *Parker, Coulter, Daley & White et al.*, the Court of Appeals affirmed the dismissal of the petitioner's civil rights action against the Chief Justice of the State Court terming the action "patently frivolous," (Appendix B). The petitioner did not seek certiorari and would thus appear to be barred from relitigating the same issue under the well-established doctrine of collateral estoppel. *cf. Harris* v. *Washington*, 404 U.S. 55, 56 (1971).

The Court of Appeals was correct in concluding that the petitioner's appeal was "frivolous" and that "[e]ven if rectification was the result of an ex parte communication, we see no deprivation or impropriety rising to constitutional proportions and no causal nexus between the alleged impropriety and plaintiff's default, which he brought upon himself. Nor do we see elsewhere any federal cause of action." (Appendix A).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1973.

APPENDIX A.

United States Court of Appeals
For the First Circuit

No. 73-1068

JAMES T. ANDERSON,
PLAINTIFF, APPELLANT,
v.
EDWARD FRODERMAN et al.,
DFENDANTS, APPELLEES.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

MEMORANDUM AND JUDGMENT

Entered: May 8, 1973

The gist of this latest of plaintiff's complaints seems to be that because a presiding judge of a state superior court changed a trial date to allow time for the taking of a deposition, allegedly after an ex parte communication with defendants, the ultimate defaulting of plaintiff for failing to respond to a notice of deposition can be traced to this supposed violation of due process. Our sense from the records is that the earlier trial date may have been set contrary to the court's standing arrangements. Even if rectification was the result of an ex parte communication, we see no deprivation or impropriety rising to constitutional proportions and no causal nexus between the alleged impropriety and plaintiff's default, which he brought upon himself. Nor do we see elsewhere any federal cause of action.

The appeal being frivolous, the orders are affirmed under Local Rule 12.

By the Court:
(s) DANA H. GALLUP
Clerk.

APPENDIX B.

United States Court of Appeals
For the First Circuit

No. 71-1265.

JAMES T. ANDERSON,
PLAINTIFF, APPELLANT.

v.

PARKER, COULTER, DALEY AND WHITE et al.,
DEFENDANTS, APPELLEES.

ORDER OF COURT
Entered September 29, 1971

The Commonwealth of Massachusetts and Walter H. McLaughlin, Chief Justice of the Massachusetts Superior Court, move to dismiss the appeal against them under Local Rule 6.

The Commonwealth is not a party, and there is nothing to dismiss so far as it is concerned.

The claim against the Chief Justice is patently frivolous. The motion to dismiss as to him is allowed.

By the Court:
(s) DANA H. GALLUP
Clerk.

Enter:

[cc: Mr. Anderson and Messrs. McCarthy, Melick and Parker, Coulter, Daley and White et al.]